

STATE OF MICHIGAN  
COURT OF APPEALS

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NORTH POINTE INSURANCE COMPANY,

Plaintiff/Counterdefendant-  
Appellant,

v

EMANUEL STEWARD and EMANUEL  
STEWART ENTERPRISES, INC.,

Defendants/Counterplaintiffs-  
Appellees

and

DWAYNE J. ROBINSON,

Defendant.

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UNPUBLISHED

March 4, 2004

No. 240125

Wayne Circuit Court

LC No. 99-901524

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

BORRELLO, J. (*dissenting in part and concurring in part*).

The majority holds that plaintiff had no cause of action in this matter because his claims were governed by his insurance contract. Thus, the majority accepts defendant's argument that it had no duty to investigate Robinson's claim, despite its assertions in its letter that it would vigorously defend against this claim and that it had opened an investigation. I disagree.

This Court has readily imposed a duty "where a defendant voluntarily assumed a function that it was under no legal obligation to assume." *Baker v Arbor Drugs*, 215 Mich App 198, 205; 544 NW2d 727 (1996), citing *Babula v Robertson*, 212 Mich App 45, 50-51; 536 NW2d 834 (1995), *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992), *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991), *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990), overruled on different grounds by *Krass v Tri-County Sec, Inc*, 233 Mich App 661 (1999), and *Sponkowski v Ingham Co Rd Comm'n*, 152 Mich App 123, 127; 393 NW2d 579 (1986). For instance, in *Baker*, we held that although the defendant pharmacy had no inherent duty to inform customers about possible harmful drug interactions, the pharmacy voluntarily undertook that duty by using a computer program designed for that purpose and advertising its use of the computer program. *Id.* at 250-206. Similarly, in *Scott, supra*, our Supreme Court found that although a nightclub did not normally have a duty to provide parking lot security, the club in that case voluntarily undertook that duty

by advertising that its parking lot was secure. *Id.* at 448-449. The Court found that the scope of the defendant's promises was explicitly contained in its advertisement. *Id.*

In the present case, by explicitly telling Steward it was investigating on his behalf, North Pointe voluntarily assumed a duty. The scope of North Pointe's voluntarily assumed duty to investigate the premises liability claim can be assessed from the explicit language of North Pointe's letter. North Pointe's argument to the contrary appears to ignore the letter and focus solely on the terms of the insurance contract. North Pointe offers no argument regarding why its statement in the letter should not be considered other than quoting from *Stockdale v Jamison*, 416 Mich 217; 330 NW2d 389 (1986) that its duty arose "solely from the language of the insurance contract." But not only was *Stockdale* overruled by *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989), the cited passage was written in the context of an insurance policy assignee who was trying to recover more than the policy limits. *Id.* at 221. Thus, North Pointe assumed a duty and was thus under an obligation to perform the duty non-negligently, which the jury determined North Pointe breached.

The majority next contends that Steward's claim of abuse of process should fail as a matter of law. Again, I disagree. Abuse of process, or "the wrongful use of process of a court," *Spear v Pendill*, 164 Mich 620, 623; 130 NW2d 343 (1911), was characterized by the *Spear* Court in the following oft-quoted passage:

"Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose, and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." [*Three Lakes Ass'n v Whiting*, 75 Mich App 564, 572; 255 NW2d 686 (1977), quoting *Spear*, *supra* at 623.]

Thus, instances where a litigant did nothing more than pursue legal action with impure intentions has been distinguished from instances where the litigant has engaged in "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . ." *Id.* at 573, quoting Prosser, Torts (4th ed), § 121, p 857. In *Three Lakes*, this Court determined that the plaintiff stated a cause of action for abuse of process by alleging that the defendant conducted its lawsuit against the plaintiff in an oppressive manner and offered to dismiss its case against plaintiff in exchange for the plaintiff not opposing the defendant's proposed condominium development. *Id.* at 570. In *Friedman v Dozor*, 412 Mich 1; 312 NW2d 585 (1982) our Supreme Court reiterated its position in *Spear*, *supra*, by stating that in order to recover upon a theory of abuse of process a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of the process which is improper in the regular prosecution of the proceeding. *Id.* at 30. In this case, North Pointe admitted that the ulterior purpose was to compel settlement of the two matters. Additionally, North Pointe admitted that it offered to dismiss the declaratory judgment action after Robinson offered to settle in exchange for Steward dismissing his counterclaim. Thus, this case is similar to the fact pattern in *Three Lakes*, *supra*. North Pointe offered to dismiss its declaratory action in exchange for Steward's dismissal of his complaint, thereby meeting the second test put forward by *Friedman*, *supra*. Moreover, in its complaint, North Pointe alleged matters that it clearly knew or should have known were false, therefore committing "an act in the use of process" that was improper. See

*Friedman, supra* at 30. Thus, I would hold that the trial court did not err in allowing Steward's claim for abuse of process to proceed to the jury.

In this case, North Pointe did not have any evidence that Steward failed to cooperate with its investigation into the matters which led to claims being filed against Steward's company. Nonetheless, North Pointe instituted legal proceedings against Steward, forcing him to retain counsel and answer their frivolous declaratory action. With this Court's decision, the majority has established that an insurance company such as North Pointe possesses the authority to bring a declaratory action against its insured for the sole purpose of securing a more favorable settlement. Thus, the majority's ruling allows North Pointe to institute frivolous litigation against Steward, and in the process, leaves Steward with no recourse. I dissent because such a holding is unjust.

I concur with the decision reached by the majority on the issue of intentional infliction of emotional distress. But because the jury verdict did not delineate between the separate causes of action, I would allow the jury's verdict, which included an award for Steward's attorney's fees, to stand.

/s/ Stephen L. Borrello